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7
8 **STATE OF CALIFORNIA**

9 **NEW MOTOR VEHICLE BOARD**

10 MATHEW ENTERPRISE, INC., dba
11 STEVENS CREEK CHRYSLER JEEP
AND DODGE,

12 Protestant,

13 v.

14 FCA US, LLC,

15 Respondent.

Protest Nos.: PR-2484-16, PR-2485-16, PR-2486-
16, and PR-2487-16

**PROTESTANT MATHEW ENTERPRISE,
INC.'S OPPOSITION TO MOTION TO
DISMISS PROTESTS**

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Protestant Mathew Enterprise, Inc. dba Stevens Creek Chrysler Jeep Dodge and Ram (“STEVENS CREEK CJDR” or “Protestant”) hereby submits this opposition to the Motion to Dismiss Protests (the “Motion”) filed by Respondent FCA US, LLC (“FCA” or “Respondent”).

I. INTRODUCTION

In its Protests, STEVENS CREEK CJDR sets forth sufficient facts to establish that the California New Motor Vehicle Board (the “Board”) has jurisdiction to hear and consider the ongoing termination of its FCA franchises. STEVENS CREEK CJDR alleges, among other things, that FCA’s refusal to authorize the dealership’s relocation is tantamount to termination of the franchise because STEVENS CREEK CJDR will be unable to continue to operate in its current location. STEVENS CREEK CJDR filed these Protests pursuant to Vehicle Code Section 3060 and 3061 to protest the ongoing termination of its franchise. FCA submits no evidence or authority, let alone an amount sufficient to meet its burden of proof, to support its position that the Protests should be dismissed without an evidentiary hearing on the merits.

FCA need not serve a “written notice” of termination for the Protests to be ripe. In fact, one of the grounds for the Protests is FCA’s failure to provide such notice in the first place. Nor must STEVENS CREEK CJDR already be terminated to have standing – that would defeat the purpose of a protest which provides for a statutory stay of termination pending consideration and a hearing. Unlike cases wherein the Board’s protest jurisdiction is called upon after shutdown of dealership operations, STEVENS CREEK CJDR is not seeking damages or other post-termination relief by way of these Protests. Rather, STEVENS CREEK CJDR seeks only the statutory relief to which it is entitled to prohibit the termination which can only be granted by the Board.

For these reasons, as set forth further herein, STEVENS CREEK CJDR respectfully requests that the Board deny the Motion.

II. BACKGROUND FACTS

The allegations contained in the Protests are incorporated herein in full, and are to be considered true for purposes of the Motion. *See, e.g., Daar v. Yellow Cab Company* (1967) 67 Cal.2d 695, 712.

1 **A. The Parties**

2 Protestant STEVENS CREEK CJDR is a new motor vehicle dealer selling Chrysler, Jeep,
3 Dodge, and Ram vehicles and parts, is duly licensed as a vehicle dealer by the State of California.
4 Respondent FCA distributes FCA products and is the franchisor of Protestant. STEVENS
5 CREEK CJDR has operated as an authorized new motor vehicle dealer at 4100 Stevens Creek
6 Boulevard, San Jose, CA 95129 (the “Current Location”) since December 6, 2006. (*See*, *Protests*
7 *at* ¶¶ 1-8).

8 Protestant’s Current Location is owned by FCA Realty LLC (f/k/a Chrysler Group Realty
9 Company LLC) (“FCA Realty”). FCA Realty is a wholly-owned subsidiary of FCA or of FCA’s
10 parent or of another entity that shares, either directly or indirectly, common ownership with FCA.
11 There is a complete unity of interest between FCA Realty and FCA and they are alter egos of
12 each other. (*Id.* *at* ¶¶ 7-11).

13 **B. Dealer Agreements**

14 Protestant and Respondent are parties to written dealership agreements (“Dealer
15 Agreements”) establishing Protestant as a franchised dealer for the sale of FCA brands of
16 vehicles. The Dealer Agreements authorize Protestant to conduct Jeep dealership operations only
17 at the Protestant’s Current Location but also contemplates Protestant being able to change the
18 location of its dealership operations with FCA’s prior written approval. (*Id.* *at* ¶¶ 5-6).

19 **C. The Lease**

20 On or about December 6, 2006, Protestant entered into what it believed was a temporary
21 lease agreement (“Lease”) with Chrysler Realty Company LLC (“Old Chrysler Realty”) until Old
22 Chrysler Realty’s interest in Protestant’s Current Location was acquired by FCA Realty in or
23 about June 2009 as the result of the bankruptcy of Old Chrysler Realty and its affiliates. The
24 dealership facilities at Protestant’s Current Location are antiquated and not competitive, and in
25 dire need of renovation or replacement. An upgrade in Protestant’s dealership facility is essential
26 for the continued viability and success of Protestant’s business under the Dealer Agreements. (*Id.*
27 *at* ¶¶ 11-16). Protestant has attempted to purchase the land and buildings at Protestant’s Current
28 Location to no avail. (*Id.* *at* ¶ 16).

1 Prior to January 1, 2016, FCA debited Protestant's account with FCA each month in the
2 total amount of \$69,000 for rent, taxes and insurance. (*Id.* at ¶ 19).

3 **D. Respondent's Facility Proposal**

4 On or about December 21, 2015, Protestant received a demand letter, dated December 18,
5 2015, from FCA Realty. In that letter, FCA Realty notified Protestant that, unless Protestant
6 executed and returned to FCA Realty a copy of a new lease ("Proposed New Lease") by
7 December 31, 2015, FCA Realty would increase "the current rental rate by 200% ." The
8 Proposed New Lease contained many unreasonable onerous terms and conditions, including no
9 option to renew at the conclusion of the 5 year term, initial monthly base rent of \$93,907, and the
10 right of FCA to construct new dealership facilities at a cost not to exceed \$14,000,000
11 ("Respondent's Facility Proposal"). Assuming Respondent's Facility Proposal was implemented,
12 the monthly base rent would be adjusted to the sum of \$93,907, plus 10% of the total cost of the
13 improvements divided by 12. Protestant could not and did not accept the Proposed New Lease
14 for several obvious reasons. Namely, it would render Protestant so uncompetitive and
15 unprofitable that it eventually would be forced to cease operations of its dealership at Protestant's
16 Current Location. (*Id.* at ¶¶ 20-22).

17 Effective January 1, 2016, FCA doubled the debit of Protestant's account in the total
18 amount of \$138,000, far in excess of market rent, purportedly as consideration for Protestant's
19 occupancy of Protestant's Current Location. (*Id.* at ¶¶ 23-24).

20 **E. Protestant's Relocation Facility Proposal**

21 In January of 2016, Protestant presented an alternative plan ("Protestant's Relocation
22 Facility Proposal") and alternative location at 3566 Stevens Creek Boulevard ("Proposed
23 Location") for providing its Jeep dealership with competitive facilities which would result in a
24 rent factor that would be a fraction of its rent factor under Respondent's Facility Proposal and
25 which would allow Protestant to have control over its business future by constructing a
26 competitive facility on land owned by Protestant or an affiliate under common ownership and
27 control with Protestant. (*Id.* at ¶¶ 25-28).

28 On February 5, 2016, FCA responded to Protestant's Relocation and Facility Proposal
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1 with a letter rejecting that proposal. On March 29, 2016, FCA reaffirmed its rejection after
2 receiving further information from Protestant. (*Id.* at ¶ 31). The alleged reasons given by FCA for
3 its rejection of Protestant's Relocation and Facility Proposal are without merit and pre-textual.
4 FCA's real reason for rejecting Protestant's Relocation and Facility Proposal is to force Protestant
5 to remain at Protestant's Current Location at an unaffordable rent factor and eventually be forced
6 to cease dealership operations and thereby terminate the Dealer Agreements. FCA wants to
7 replace Protestant as the Jeep dealer on the Stevens Creek Boulevard, auto row. (*Id.* at ¶¶ 32-40).

8 **F. Termination of STEVENS CREEK CJDR's Franchises**

9 Only three scenarios exists respecting the issue of Protestant's facilities due to FCA's
10 current actions, and each results in termination by FCA of Protestant's franchises. First,
11 Protestant cannot implement its Relocation and Facility Proposal without Respondent's consent
12 on penalty termination by FCA for relocating without consent, yet FCA refuses to consent. (*Id.* at
13 ¶ 41). Second, if Protestant remains at Protestant's Current Location and does not accept
14 Respondent's Facility Proposal, Respondent will also terminate the Franchise by causing FCA
15 Realty to terminate Protestant's rights as a tenant to occupy Protestant's Current Location, which
16 is the only currently authorized location at which Protestant can conduct Jeep operations under
17 the Dealer Agreements or by collecting the exorbitant month fee for occupancy of the premises,
18 which will force Protestant to give up the Dealer Agreements and go out of business without an
19 affordable upgrade of its dealership facility. (*Id.* at ¶¶ 43-47). Third, as outlined above,
20 accepting Respondent's Facility Proposal is completely unacceptable and Protestant cannot be
21 forced to do so based on FCA imposing termination as the only alternative in lieu of acceptance.

22 FCA's simultaneous refusal to approve Protestant's Relocation and Facility Proposal and
23 demand for unreasonable terms and exorbitant charges will result in the termination of
24 Protestant's existing franchise without notice or good cause in violation of California Vehicle
25 Code § 3060 because it will result in the insolvency of the Protestant and force Protestant out of
26 business. Such constructive termination will result from FCA's economic duress of Protestant by
27 wrongfully compelling Protestant to remain at Protestant's Current Location and to either attempt
28 to compete with an antiquated and uncompetitive dealership facility or incur a ruinous rent factor

1 by being forced to accept Respondent's Facility Proposal. Under either scenario, Protestant will
2 become insolvent and thus terminated as a dealer. (*Id.*)

3 Respondent has not provided notice for termination of Protestant's franchise as required
4 by Veh. Code § 3060.

5 **G. Complaint in Federal Court**

6 On June 24, 2016, Protestant filed a complaint against Respondent in the United States
7 District Court, Northern District of California alleging, in part, Protestant is acting in violation of
8 Veh. Code § 3060. On November 16, 2016, the District Court dismissed Protestant's claims,
9 including its claim under the Vehicle Code because Protestant had not exhausted its
10 administrative remedies by first bring the matter to the California New Motor Vehicle Board. (*Id.*
11 at ¶¶ 44-45; Exhibit A to Protests).

12 **III. LEGAL ARGUMENT**

13 **A. STEVENS CREEK CJDR's Protests Fall Under the Board's Jurisdiction.**

14 STEVENS CREEK CJDR filed the Protests under the Board's jurisdiction pursuant to
15 Vehicle Code Sections 3060 requesting that Respondent not terminate its FCA franchise and not
16 refuse to continue its existing franchise pending a hearing which will show that Respondent has
17 not established good cause for its actions. *See, Yamaha Motor Corp. v. Superior Court* (1986)
18 185 Cal. App. 3d 1232, 1241 (Cal Ct. App. 1986) ("[T]he [CNMVB] is specifically empowered
19 to '[h]ear and consider ... a protest by a franchisee pursuant to Section 3060.' "). Moreover, as it
20 stands, there is currently no other forum for STEVENS CREEK CJDR to seek the relief
21 requested. (*See* Exhibit A to Protests, District Court Order).

22 STEVENS CREEK CJDR has set forth extensive factual allegations in support of its
23 Protests (*See, e.g.,* Protests at ¶¶ 32, 41-48). Namely, STEVENS CREEK CJDR contends that
24 the alleged reasons for FCA's rejection of STEVENS CREEK CJDR's Relocation and Facility
25 Proposal are without merit, pre-textual, and result in the constructive termination of STEVENS
26 CREEK CJDR's franchise. (*Id.*) Additionally, FCA has taken these actions without providing
27 "written notice" and without a finding by the Board of "good cause for termination," as required
28 by Section 3060.

1 In short, STEVENS CREEK CJDR has set forth protests against FCA under Vehicle Code
2 Section 3060, *et seq.* For this reason alone, the Motion should be denied.

3 **B. Respondent Fails to Meet its Burden to Establish a Dismissal Without an**
4 **Evidentiary Hearing on the Merits.**

5 As set forth above, STEVENS CREEK CJDR has established the validity of its
6 Protests. Respondent fails to present any evidence to the contrary, let alone an amount
7 sufficient to meet its burden to establish that a dismissal of the Protests is warranted without
8 an evidentiary hearing on the merits. While Courts have found that the Board has implied
9 authority to dismiss protests, such implied authority is limited to rare instances [which are not
10 present here] where, analogous to a summary judgment motion, a respondent establishes that
11 “undisputed facts demonstrate good cause for franchise termination as a matter of law and
12 afford no basis for preventing termination of the franchise.” *See, Duarte & Witting, Inc. v.*
13 *New Motor Vehicle Bd.* (2002) 104 Cal.App.4th 626, 638 (dismissal found appropriate since
14 good cause for termination of the franchise exists as a matter of law because it was undisputed
15 that the franchisor was discontinuing manufacture of the product and the franchise agreement
16 allows for termination upon such discontinuation); *see also Frost v. State Personnel Board*
17 (1961) 190 Cal.App.2d 1, 11 Cal.Rptr. 718 (where, as here, a protestant makes a prima facie
18 showing, it would be prejudicial error in entertaining and granting a dismissal motion in the
19 nature of a nonsuit without conducting an evidentiary hearing and weighing the evidence on
20 the merits).

21 In the present case, STEVENS CREEK CJDR sets forth extensive facts to establish its
22 claim under Vehicle Code Section 3060 – FCA’s unreasonable conduct resulting in the
23 termination of the franchise. FCA fails to submit any evidence in support of its Motion to
24 Dismiss to the contrary. Issues of fact remain for which an evidentiary hearing must be held,
25 including, without limitation, whether FCA’s actions are reasonable and whether those actions
26 result in the termination of the franchise. For this reason alone, the Motion should be denied.

1 As further addressed herein, FCA's arguments that the Board lacks jurisdiction to hear
2 this constructive termination without written notice of termination or actual termination of the
3 franchise are unavailing.

4 **1. Written Notice of Termination is Not Required.**

5 The absence of a written termination notice by FCA to Protestant "does not prevent the
6 [Board] from exercising its powers to resolve" this dispute. *See Yamaha Motor Corp.*, 185
7 Cal. App. 3d at 1239–40. Rather, "[t]he administrative remedy of a [Board] protest remains
8 available to [Protestant], despite the lack of formal notice." *Id.* at 1240. In fact, FCA's
9 failure to provide "written notice...setting forth the specific grounds for termination," is one
10 of the basis for STEVENS CREEK CJDR's Protests. *See*, Vehicle Code Section 3060 (a);
11 *British Motor Car Distribs. v. New Motor Vehicle Bd.*, 194 Cal.App.3d 81, 93 (1987).

12 **2. STEVENS CREEK CJDR Has Standing to Assert the Protests.**

13 STEVENS CREEK CJDR has standing to file a protest pursuant to Vehicle Code Sections
14 3060 to stop the termination of its franchise. STEVENS CREEK CJDR need not already be
15 terminated nor is it seeking damages or other post-termination relief by way of these Protests. If
16 FCA's argument were accepted, that would defeat the purpose of the statute which provides for a
17 stay of termination pending an evidentiary hearing.

18 The Protests arise out of the termination of STEVENS CREEK CJDR's dealer agreement
19 with FCA, which the protests clearly demonstrate FCA is currently and actively seeking to
20 accomplish. No active effort to terminate was involved in *Ri-Joyce, Inc. v. New Motor Vehicle*
21 *Bd.* (1992) 2 Cal.App.4th 445 cited by FCA; that case involved the dealer's claim that the
22 manufacturer was fraudulently undercutting its business by allowing a new, competing dealer in
23 the area. Also cited by FCA but not on point is *Hardin Oldsmobile v. New Motor Vehicle Bd.*
24 (1997) 52 Cal.App.4th 585, 592–98, where the dealer's claims were found to be outside the
25 jurisdiction of the Board because the dealer sought damages rather than relief specifically
26 committed to the Board's jurisdiction.

27 Here, the Board's jurisdiction is squarely found in section 3060 and that statute
28 specifically encompasses termination and that is exactly what the current protest involves: the
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1 ongoing efforts by FCA to terminate STEVENS CREEK CJDR's franchise agreement.

2 **3. A Protest May Challenge Both Formal and Informal Factory Action**
3 **to Terminate a Franchise.**

4 FCA's reliance on the unpublished opinion stated in *Roadtrek Motorhomes v. California*
5 *New Motor Vehicle Board* (Cal. Ct. App., July 14, 2016, No. G049534) 2016 WL 3885006, at
6 *7-8 is also procedurally and substantively misplaced. In *Roadtrek*, the dealer's appeal sought to
7 overturn the Board's decisions following a pre-hearing motion in limine by the dealer to dispense
8 of the issue of good cause based on a claim that there was a de facto termination. The motion was
9 denied by the Administrative Law Judge because the remedy sought by the dealer exceeded the
10 Board's jurisdiction in that it sought damages based on an alleged material breach of the franchise
11 agreements and the claim "amounted to a de facto termination of the franchises constituted "part
12 of the 'existing circumstances' " that "must be considered by the Board" in determining whether
13 good cause existed to terminate the franchises, which "can be thoroughly explored and resolved
14 during the hearing on the termination protests." " *Id.* Thereafter, the Board held a "lengthy
15 evidentiary hearing" on the protests, reviewed the evidence, made factual findings, and issued its
16 decision overruling the protests. *Id.* On appeal, the Court found that "the Board did consider the
17 parties' entire relationship, including the [de facto termination] actions that occurred in late 2009
18 and in early 2010, in determining good cause existed for Roadtrek's termination of the Colton
19 franchise." *Id.*

20 Thus, *Roadtrek* actually supports STEVENS CREEK CJDR's position that the Protests
21 should not be dismissed, at least prior to an evidentiary hearing on the merits.

22 In addition, the Board should be guided in this area by the reasoning adopted by several
23 other courts that have held that constructive termination claims are viable under state franchise
24 laws. *See, e.g., Glick v. General Motors* (2d Cir.1989) 865 F.2d 494 (the fact that a franchisee is
25 able to continue in business at the time the [franchise statute] claim is being asserted is not
26 necessarily determinative of the ability to maintain a claim under the statute); *Petereit v. S.B.*
27 *Thomas, Inc.*, 63 F.3d 1169, 1182 (2d. Cir.1995) ("[i]f the protections of the Connecticut
28 legislature afforded to franchisees were brought into play only by a formal termination, those

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1 protections would quickly become illusory. We think it reasonable therefore to believe it was the
2 legislature's aim to have the umbrella of the Act's protection cover constructive as well as formal
3 termination. To hold otherwise would allow franchisors to accomplish indirectly that which they
4 are prohibited from doing directly."); *Carlos v. Philips Business Systems, Inc.*, 556 F.Supp. 769
5 (E.D.N.Y.1983); *Robert Basil Motors, Inc. v. General Motors Corp.* (W.D.N.Y., Apr. 17, 2004,
6 No. 03-CV-315A) 2004 WL 1125164, at *3-5 ("questions of fact exist as to whether a
7 constructive termination ... has taken place ... to the extent the instant motion seeks to dismiss
8 the statutory claim, the motion should be denied.").

9 In California, the statutory directive to the parties and the Board is even stronger: a
10 manufacturer/franchisor may not terminate a franchise absent compliance with specific notice
11 procedures: (a) the franchisee/dealer and the New Motor Vehicle Board each receive written
12 notice from the manufacturer/franchisor sixty days before the effective date thereof setting forth
13 the specific grounds for termination or refusal to continue; (b) the written notice contains exact
14 language as set forth at Vehicle Code §3060(a)(1)(C); and (c) the New Motor Vehicle Board finds
15 that there is good cause for termination following a hearing held pursuant to section 3066. Veh.
16 Code § 3060. The notice requirement was put into a jury instruction approved in *Powerhouse*
17 *Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.*, 221 Cal.App.4th 867, 882 (2013). The
18 jury was instructed: "When a distributor wishes to terminate a dealer agreement (aka franchise) it
19 is required by law to give a Termination Notice that conforms to Vehicle Code section 3060."
20 Moreover, pursuant to Vehicle Code section 3060 (a)(2), when a franchisee/dealer files a protest
21 before the New Motor Vehicle Board challenging "termination," then the manufacturer/franchisor
22 is statutorily prohibited from terminating the dealer's franchise until the New Motor Vehicle
23 Board holds a hearing and issues formal findings approving the termination.

24 Here, the Board is faced with a clear claim of franchisor action to terminate a dealer
25 without compliance with the statutory requirements, and the dealer's protest of those actions of
26 termination in an effort to obtain the statutory protections that would prohibit the factory from
27 taking those actions. Protestant thus falls squarely both within the Board's protest jurisdiction and
28 within the narrow scope of relief the statute authorizes following a protest.

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1 As with the cases cited above recognizing the need to accept protests of informal
2 franchisor action to effect termination, if the protections of California Vehicle Code Section 3060
3 were only available to dealers challenging formal termination, those provisions would become
4 illusory in all other cases and would thus encourage efforts by franchisors to evade and avoid the
5 law by employing indirect means. Consequently, STEVENS CREEK CJDR's termination protest
6 must be permitted proceed: to hold otherwise would allow FCA to accomplish indirectly what it
7 is prohibited from doing directly.

8 **IV. CONCLUSION**

9 For the foregoing reasons, and those set forth in the Protests, FCA's Motion must be
10 denied in its entirety. Accepting the allegations in the Protest as true, STEVENS CREEK CJDR
11 has adequately pled violations of Vehicle Code Section 3060, *et seq.*, and is entitled to an
12 evidentiary hearing on the merits to determine whether the protest should be sustained or
13 overruled.

14
15 DATED: January 24, 2017

ARENT FOX LLP

16
17 By: 

18 HALBERT B. RASMUSSEN
19 Counsel for Protestant
20 MATHEW ENTERPRISE, INC.
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1 **PROOF OF SERVICE**

2 I am over the age of eighteen years and not a party to the within action. My business address
3 is 555 West Fifth Street, 48th Floor, Los Angeles, CA 90013.

4 On January 24, 2017, I served the within **PROTESTANT MATHEW ENTERPRISE,**
5 **INC.'S OPPOSITION TO MOTION TO DISMISS PROTESTS**, on the interested parties in
6 said action by placing true copies enclosed thereof in a sealed envelope, with postage thereon fully
7 prepaid in the United States mail at Los Angeles, California, addressed as follows; and further, that
8 I emailed same to the New Motor Vehicle Board and Parties at the email addresses reflected below:

9 New Motor Vehicle Board
10 1507 21st Street, Suite 330
11 Sacramento, California 95814
12 Tel: (916) 445-1888
13 Fax: (916) 323-1632
14 Emails: nmvb@nmvb.ca.gov
15 Robin.Parker@nmvb.ca.gov

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20 On this date, I placed the document(s) in envelopes addressed to the person(s) on the
21 attached service list and sealed and placed the envelopes for collection and mailing following the
22 ordinary business practices of my employer for the processing and mailing with the U.S. Postal
23 Service on the same day as the day of collection in the ordinary course of business.

24 I declare under penalty of perjury under the laws of the State of California that the foregoing
25 is true and correct.

26 Executed on January 24, 2017, at Los Angeles, California.

27 
28 LouAnn Crosby

PROTESTANT MATHEW ENTERPRISE, INC.'S OPPOSITION TO MOTION TO DISMISS PROTESTS